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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/921,844	08/03/2001	Gary K. Michelson	101.0084-01000	8295
22882	7590	12/15/2008		
MARTIN & FERRARO, LLP 1557 LAKE O'PINES STREET, NE HARTVILLE, OH 44632			EXAMINER SNOW, BRUCE EDWARD	
			ART UNIT 3738	PAPER NUMBER
			MAIL DATE 12/15/2008	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 09/921,844	<b>Applicant(s)</b> MICHELSON, GARY K.	
	<b>Examiner</b> Bruce E. Snow	<b>Art Unit</b> 3738	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 11 September 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1, 219 and their depending claims is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 219 and their depending claims is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Response to Arguments***

Applicant's amendments and arguments filed 9/11/08 have been fully considered. Applicant specification does not indicate that the drawings are to scale. Further, a single drawing can only teach a single included angle between the sides, not a range of "greater than 90 degree". Said range is broader than the single angle shown in the drawings. This language was not removed from the specification.

Applicant's amendment overcame the rejection of at least claim 219 under 35 U.S.C. 102(e) as anticipated by Fraser et al (6,592,624).

Regarding the combination rejection of Paul in view of Fraser, the Examiner's position has been incorporated into the grounds of rejection below.

### ***Specification***

The amendment filed 10/09/07 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: an included angle that is larger than 90 degrees. Applicant specification does not indicate that the drawings are to scale. Further, a single drawing can only teach a single included angle between the sides, not a range of "greater than 90 degree".

Applicant is required to cancel the new matter in the reply to this Office Action.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

All claims are rejected under 35 U.S.C. 103(a) as being unpatentable over Abei et al (6,482,233) in view of Fraser (6,592,624).

Referring to figure 6, **Abei et al** teaches a teaches a spinal implant comprising a plurality of pyramid-shaped projections 28 formed on the upper and lower surfaces of the implant which are slanted to “allow for ease of insertion and avoid retroplusion after insertion (4:30 et seq.)” The projections are slanted towards the trailing end, therefore, having a forward facing facet which is longer than a rearward facet. The projections further include side facets and a rectangular base. However, Abei et al is silent regarding the length of the forward facing facet having a maximum length as measured along a line parallel to the maximum length of the base, the maximum length of the forward facet greater than the maximum length of the base.

Referring to figure 1C, Fraser teaches a similar spinal implant having surface projections 18 wherein the rearward facet 34 can either have a positive slope or negative slope. It would have been obvious to one having ordinary skill in the art to have formed the rearward facet of Abei et al forming a negative slope such that the length of the forward facing facet is greater than the maximum length of the base such that the

projections dig into the bone and better resist expulsion. Therefore, the maximum length of the forward facet is greater than the maximum length of the base (claim 219).

Regarding claim 1, with the rearward facet having a negative slope, the adjacent projections of Abei et al would produce "at least a portion of said rearward facet of the first surface projection overlying a portion of said forward facet of said second surface projection".

Many of applicant's dependent claims claim a wide range of limitations, for example, elements/materials/shapes/tools/etc which lack criticality in the specification, the use of any limitations in lieu of those used in the references solves no stated problem and produces no benefits and would have been an obvious matter of design choice for someone skilled in the art. Additionally, these limitations are well known in the prosthetic art and would have been obvious to one having ordinary skill.

Additionally, it would have been obvious to one having ordinary skill to have used any bone growth material known in the art or to have constructed the implant from any material known in the art for their known properties and characteristics.

Claim 219 and its dependent claims are rejected under 35 U.S.C. 103(a) as being unpatentable over Paul et al (6,258,125) in view of Fraser (6,592,624).

**Paul et al** teaches a spinal implant comprising a plurality of pyramid-shaped projections 12, as shown in figures 9, 10A, and 11, formed on the upper and lower surfaces of the implant; see 3:42. The projections are slanted towards the trailing end, therefore, having a forward facing facet which is longer than a rearward facet. The

projections further include side facets and a rectangular base. However, Paul et al is silent regarding the length of the forward facing facet having a maximum length as measured along a line parallel to the maximum length of the base, the maximum length of the forward facet greater than the maximum length of the base.

Referring to figure 1C, Fraser teaches a similar spinal implant having surface projections 18 wherein the rearward facet 34 can either have a positive slope (like that of Paul et al or shown in figure 1A) or negative slope. It would have been obvious to one having ordinary skill in the art to have formed the rearward facet of Paul et al forming a negative slope such that the length of the forward facing facet is greater than the maximum length of the base such that the projections dig into the bone and better resists expulsion. Therefore, the maximum length of the forward facet greater than the maximum length of the base (claim 219).

Many of applicant's dependent claims claim a wide range of limitations, for example, elements/materials/shapes/tools/etc which lack criticality in the specification, the use of any limitations in lieu of those used in the references solves no stated problem and produces no benefits and would have been an obvious matter of design choice for someone skilled in the art. Additionally, these limitations are well known in the prosthetic art and would have been obvious to one having ordinary skill.

Additionally, it would have been obvious to one having ordinary skill to have used any bone growth material known in the art or to have constructed the implant from any material known in the art for their known properties and characteristics.

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Bruce E. Snow whose telephone number is (571) 272-4759. The examiner can normally be reached on Mon-Thurs.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on (571) 272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Bruce E Snow/  
Primary Examiner, Art Unit 3738